



STATE OF NEW YORK

UNEMPLOYMENT INSURANCE APPEAL BOARD

PO Box 15126

Albany NY 12212-5126

DECISION OF THE BOARD

Mailed and Filed: MAY 31, 2022

IN THE MATTER OF:

Appeal Board No. 621871

PRESENT: JUNE F. O'NEILL, MEMBER

In Appeal Board No. 621867, the claimant appeals from the decisions of the Administrative Law Judge filed February 25, 2022 that sustained the initial determination holding the claimant eligible at the weekly benefit amount of \$227, which excludes the base period employment with Just Care LLC pursuant to Labor Law § 590(9) because the claimant was neither a citizen nor authorized

to work in the United States, effective October 1, 2020 through June 24, 2021, as modified to be effective March 31, 2021 through to June 24, 2021.

In Appeal Board Nos. 621868 & 621869, the claimant appeals from the decisions of the Administrative Law Judge filed February 25, 2022 that sustained the initial determinations holding the claimant ineligible to receive benefits on the basis that the claimant was not available for employment effective October 1, 2020 through June 24, 2021, as modified to be effective March 31, 2021 through to June 24, 2021; and charging an overpayment of \$6,600.00 in Federal Pandemic Unemployment Compensation (FPUC benefits) repayable pursuant to §

2104 (f) (2) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, as modified and referred to the Department for recalculation.

In Appeal Board Nos. 621870 & 621871, the claimant appeals from the decisions of the Administrative Law Judge filed February 25, 2022 that sustained the revised initial determinations disqualifying the claimant from receiving benefits, effective April 1, 2021, on the basis that the claimant voluntarily separated from employment without good cause; and charging the claimant with an overpayment of \$5,400.00 in FPUC benefits repayable pursuant to § 2104 (f)

(2) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020.

At the combined telephone conference hearings before the Administrative Law Judge, all parties were accorded a full opportunity to be heard and testimony was taken. There were appearances by the claimant and on behalf of the employer.

In Appeal Board Nos. 621867, 621868, 621869, we have reviewed the entire record and have considered the testimony and other evidence. It appears that no errors of fact or law have been made. The findings of fact and the opinion of the Administrative Law Judge are fully supported by the record and, therefore, are adopted as the findings of fact and the opinion of the Board. See Matter of Bruyne, 95 AD3d 1590 (3d Dept 2012); and Matter of Enrique, 13 AD3d 967 (3d Dept 2004).

In Appeal Board Nos. 621870 & 621871, based on the record and testimony in this case, the Board makes the following

FINDINGS OF FACT: The claimant, a Russian national, has worked as a home attendant for this employer from January 2020 through March 31, 2021 pursuant to an Employment Authorization Document (EAD) valid from October 1, 2018 through September 30, 2020.

In September 2020, the claimant applied to renew his employment authorization. By notice dated October 3, 2020, Department of Homeland Security (DHS) acknowledged receipt on September 25, 2020 of the claimant's I-765, Application for Employment Authorization.

As the claimant's employment authorization was automatically extended, the employer continued claimant's employment under the belief that the automatic 180-day extension expired on March 31, 2021. On April 1, 2021, the employer placed the claimant's employment on hold since he had not yet received a valid EAD.

By notice dated May 25, 2021, DHS advised that it transferred the claimant's Application to an office in Texas. By notice dated June 25, 2021, DHS advised that it approved claimant's Application for Employment Authorization, and that it will send out the EAD by separate cover. The claimant received his EAD valid from June 25, 2021 through June 24, 2023.

Meanwhile, the claimant filed a claim for unemployment insurance, made effective July 6, 2020, and received at least \$8,100.00 in FPUC benefits.

OPINION: The credible evidence fails to establish that the claimant provoked his discharge from employment when the employer separated the claimant on March 31, 2021 based on an invalid employment authorization. Significantly, the doctrine of provoked discharge is based on a claimant having voluntarily engaged in conduct that transgresses a legitimate and known obligation and which has left the employer no choice but to discharge the employee. (Matter of DeGrego, 39 NY2d 180 [3d Dept 1976]).

Here, as the claimant applied for his renewal before the EAD expired on September 30, 2020, he reasonably believed, as did his employer, that DHS would process and approve the employment authorization within the provided 180-day extension from October 1, 2020 through March 30, 2021. Although DHS did not approve the employment authorization until June 25, 2021, such extensive delay of more than 180 days was not within claimant's control. Therefore, the claimant cannot be said to have voluntarily engaged in conduct

which provoked his discharge. See Appeal Board No. 618473; Appeal Board No. 598789; and Appeal Board No. 555065. Accordingly, the claimant's employment ended under non-disqualifying circumstances, and he was not overpaid \$5,400.00 in FPUC benefits.

DECISION: In Appeal Board Nos. 621867, 621868, 621869, the decisions of the Administrative Law Judge are affirmed.

In Appeal Board Nos. 621870 & 621871, the decisions of the Administrative Law Judge are reversed.

In Appeal Board No. 621867, the initial determination, holding the claimant eligible at the weekly benefit amount of \$227, which excludes the base period employment with Just Care LLC pursuant to Labor Law § 590(9) because the

claimant was neither a citizen nor authorized to work in the United States, effective October 1, 2020 through June 24, 2021, as modified by the Judge to be effective March 31, 2021 through to June 24, 2021, is sustained.

In Appeal Board Nos. 621868 & 621869, the initial determinations, holding the

claimant ineligible to receive benefits on the basis that the claimant was not available for employment effective October 1, 2020 through June 24, 2021, as modified to be effective March 31, 2021 through to June 24, 2021; and charging an overpayment of \$6,600.00 in FPUC benefits repayable pursuant to § 2104 (f)

(2) of the Coronavirus Aid, Relief, and Economic Security (CARES) Act of 2020, as modified and referred to the Department for recalculation, are sustained.

In Appeal Board Nos. 621870 & 621871, the revised initial determinations, disqualifying the claimant from receiving benefits, effective April 1, 2021, on the basis that the claimant voluntarily separated from employment without good cause; and charging the claimant with an overpayment of \$5,400.00 in FPUC benefits repayable pursuant to § 2104 (f) (2) of the Coronavirus Aid, Relief,

and Economic Security (CARES) Act of 2020, are overruled.

The claimant's weekly benefit amount of \$227 that was based on excluded base period employment with Just Care LLC pursuant to Labor Law § 590(9) effective

October 1, 2020 through June 24, 2021, which is modified to be effective March 31, 2021 through to June 24, 2021, is referred to the Department of Labor for recalculation, if needed, not inconsistent with this decision.

The amount of the overpayment is referred to the Department for Labor or recalculation not inconsistent with this decision.

The claimant is denied benefits with respect to the issues decided herein.

(?? ?????????? ????????, ?????????? ? ?????????? ??????????? ? ????? ??????????? ??????????, ?????????? ?????????? ? ?????????? ??????????)

Federal law provides that New York State can waive repayment of Pandemic Emergency Unemployment Compensation (PEUC), Federal Pandemic Unemployment Compensation (FPUC), Lost Wages Assistance (LWA), Mixed Earners Unemployment Compensation (MEUC) or Pandemic Unemployment Assistance (PUA) benefits overpaid to the claimant if the overpayment was not the claimant's fault and repayment would be contrary to equity and good conscience. For more information on the overpayment waiver process and instructions to request a waiver, please visit the New York State Department of Labor's website, <https://dol.ny.gov/overpayment-waiver-and-appeal-process>.

JUNE F. O'NEILL, MEMBER